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Antitrust Implications of Casino Mergers: The Gamble of Defining a Relevant Market

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Antitrust Implications of Casino Mergers: The Gamble of Defining a Relevant Market

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INTRODUCTION

Recent merger announcements have turned the Las Vegas Strip into the focus of antitrust speculation. When Harrah's announced its proposed acquisition of Caesars Entertainment on the heels of the MGM Mirage-Mandalay merger announcement in 2004, industry insiders began wondering how the Federal Trade Commission (FTC) was going to handle the antitrust repercussions.[1] Speculation swarmed that the Harrah's deal was intended to disrupt the MGM Mirage-Mandalay merger by increasing regulatory scrutiny, and that the FTC could halt both deals.[2] The FTC made a second request for information from the casino giants demonstrating concerns about potential anticompetitive effects and increased market concentration.[3] Both deals were ultimately approved, after the sale of numerous casino properties.

Before the FTC decided to approve the deals, the agency had the challenge of defining the relevant market. Given that judicial outcomes

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* J.D., University of California, Hastings College of the Law, 2006; B.A., Pepperdine University. I would like to give thanks to Professor McCall for his encouragement through the writing process and special thanks to my family who have supported me through the the years.

1. Rod Smith, *The MGM Mirage-Mandalay and Harrah's-Caesars Mergers Create Questions No One Can Answer*, HOTEL ONLINE, July 18, 2004 [hereinafter Smith, *The MGM*], http://hotel-online.com/News/PR2004_3rd/Jul04_MergerScrutiny.html. Antitrust laws are enforced by two federally created enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), as well as private action by individuals who have been harmed by antitrust violations. Typically, the DOJ has specialized in the software and telecommunications industries while the FTC specializes in more traditional industries. The agencies must agree about who will handle a specific merger, and it is likely that a tacit agreement exists that the FTC will handle casino mergers. Pamela McClintock, *AT&T-Comcast May Go to the Justice*, DAILY VARIETY, Feb. 25, 2002, at 26.

2. Rod Smith, *The MGM Mirage-Mandalay and Harrah's-Caesars Mergers Create Questions No One Can Answer*, HOTEL ONLINE, July 18, 2004 [hereinafter Smith, *The MGM*], http://hotel-online.com/News/PR2004_3rd/Jul04_MergerScrutiny.html.

3. Rod Smith, *FTC Places Merger on Hold*, LAS VEGAS REV.-J., Nov. 8, 2003, at D1 [hereinafter Smith, *FTC Places*]. A second request is issued under the Hart-Scott-Rodino Act and the effect of the request is to extend the waiting period for consummation of the merger until thirty days after both parties have provided the requested information. *See* Hart-Scott-Rodino Act, 15 U.S.C. § 18a (2005). The waiting period can be voluntarily extended by the parties or terminated earlier by the FTC or DOJ. *Id.*

in merger cases invariably turn on the market share held by the merging entities, which in turn are established by the definition of the relevant market,[4] the FTC had incentive to get the definition right before questioning the deals. However, definition of the "market" in which a given casino competes is not an easy task. There are an array of basic products to examine, such as hotel rooms, slots, table games, entertainment, food and beverage, as well as potential submarkets of unique consumers (e.g., high stakes table gamblers) and geographic markets that could be internationally broad or confined as narrowly as the Las Vegas Strip and other regional markets. Case law provides frustratingly inconclusive guidance in defining service product markets and for geographic markets generally.

This Note will examine the unique challenges that the FTC and the courts face in defining a relevant market in casino industry mergers. Part I will explain how and why defining a relevant market is vital in horizontal merger analysis;[5] Part II examines the history of interaction between the FTC and the casino industry; Part III addresses the definition of relevant product market for services and delineating a relevant geographic market; and Part IV suggests what the FTC should have considered in defining the relevant market for the current round of mergers.

I. DEFINING THE RELEVANT MARKET

A. CASE LAW DEFINING THE RELEVANT MARKET

Section 7 of the Clayton Act prohibits any merger that "may" substantially lessen competition,[6] and the government has implemented a pre-merger notification program designed to stop a merger before antitrust problems develop.[7] Under the rebuttable presumption of anticompetitive effect based on market share announced in *United States v. Philadelphia National Bank*, courts have analyzed the potential anticompetitive effects of a horizontal merger by focusing on the relevant market.[8] The Court in *Philadelphia National Bank* found that

4. *See generally* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); United States v. Eastman Kodak Co., 63 F.3d 95 (2d Cir. 1995); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). "This is because under Section 7 of the Clayton Act, enforcement of the anti-merger provisions proceeds from the premise that when a small group of firms occupies a large share of the relevant market, the firms can more easily coordinate sales policies in order to raise prices above competitive levels." FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 n.8 (D.C. Cir. 1998).

5. A merger is horizontal when it involves the merger of two firms that sell the same products in the same geographic markets, i.e. the merging firms were competitors prior to the consummation of a merger. As a result of the merger, the market will have one less competitor and the post-merger firm will have a larger market share than it did prior to the merger.

6. 15 U.S.C. § 18 (2005).

7. *See* Hart-Scott-Rodino Act, 15 U.S.C. § 18a.

8. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362–63 (1963); *see also* United States v. Brown Shoe Co., 370 U.S. 294, 325 (1962); United States v. E.I. Du Pont de Nemours & Co.,

anticompetitive effects could be presumed if the merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market."[9]

B. The Merger Guidelines' Approach to Defining the Relevant Market

The U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines[10] create a framework binding on the FTC and the Department of Justice (DOJ) for determining how a merger is analyzed, and also guide the agencies in exercising prosecutorial discretion.[11] The Merger Guidelines depart somewhat from the *Philadelphia National Bank* presumption by focusing on market-wide concentration of market power rather than the aggregate of the leading firms in the market.[12] Market shares can be used as a generally satisfactory proxy for market power; thus, high market power can be inferred from high market shares and, from high market power, anticompetitive effects can be presumed.[13] In order to calculate market share, the relevant market must be defined and both the firms competing in the market and those likely to enter the market within one year must be identified. "Following these steps, the Guidelines calculate the market share of each [of these] participant[s], followed by [application of] the Herfindahl-Hirschman Index (HHI) concentration measurement for the market as a whole."[14] The Merger Guidelines have developed an approach for delineating a relevant market by primarily focusing on demand substitution in both a product and geographical market.[15]

The government posits a provisional product and a provisional geographic market, yielding a "relevant market" in which a firm competes. Taking the provisional product market, the government hypothesizes a small but significant and nontransitory increase in price (SSNIP), usually around five percent.[16] If the firm could profitably

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351 U.S. 377, 380, 391–93 (1956).

9. *Philadelphia Nat'l Bank*, 374 U.S. at 363.

10. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (rev. ed. Apr. 8, 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html [hereinafter Merger Guidelines].

11. Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy 455 (2002).

12. *See* Merger Guidelines, *supra* note 10, at 1.0.

13. Gavil, *supra* note 11, at 461. Demand substitution examines which products are substitutes in the eyes of consumers. *Id.*

14. United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1112 (N.D. Cal. 2004); Merger Guidelines, *supra* note 10, at 1.3.

15. *See* Merger Guidelines, *supra* note 10, at 1.0. Supply substitution is also taken into account after the firms in the market have been identified to determine those producers who would likely switch production to this market to take advantage of higher profits and if consumers would be receptive to these new producers. *Id.*

16. *Id.* at 1.11.

maintain this price hike, then the proper product market has been defined; however, if consumers would switch to competing products, then those substitutable products should also be included in the relevant market.[17] "A properly defined market excludes other potential suppliers . . . whose product is too different (product dimension of the market) . . . ."[18]

The government also posits a provisional geographic market and hypothesizes a SSNIP. If consumers would switch to suppliers in a different market, then the provisional market should be expanded to include these other sellers. The market has been properly defined when the consumers would not look to other markets for the products in the event of a SSNIP. Therefore, "[a] properly defined market excludes other potential suppliers (1) whose product is . . . too far away (relevant geographic market) . . . ."[19]

The Merger Guidelines combine these two markets and define the relevant market as a collection of products or services sold in a geographical region in which a hypothetical monopoly could successfully be maintained (if firms were able to coordinate their actions or make use of product differentiation).[20] Practical realities, such as public recognition of the separate market or distinct customers, are used to apply the SSNIP test; practical realities serve as an additional tool in defining a market beyond the SSNIP test.[21]

The Merger Guidelines recognize that in some markets the products can be highly differentiated, "so that products sold by different participants in the market are not perfect substitutes for one another."[22] Case law has taken a different and slightly more confusing approach to these "submarkets." In *United States v. Brown Shoe*, the United States Supreme Court expressly acknowledged the potential for relevant submarkets in stating that a "broad market" can include relevant submarkets that may be determined by examining practical indicia.[23] Courts use the list of practical indicia as a way to add to the relevant market definition;[24] however, a submarket could be misleading and lead

17. *Id.* at 1.0.

18. United States v. Mercy Health Servs., 902 F. Supp. 968, 975 (N.D. Iowa 1995).

19. *Id.* at 976.

20. *Id.*

21. *See generally* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.C. Cir. 1997); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). An earlier use of submarket analysis appears in *United States v. Brown Shoe Co.*, 370 U.S. 294, 325 (1962).

22. MERGER GUIDELINES, *supra* note 10, at 2.2. The Merger Guidelines recognize the varying degrees of substitutability in the context of unilateral anticompetitive effects. *Id.*

23. *Brown Shoe*, 370 U.S. at 325.

24. *See Staples*, 970 F. Supp. at 1075, 1078–80. Practical indicia include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325.

to overstating the competitive danger by excluding some effective substitutes. Courts may find that some suppliers are doing business in a sufficiently distinct way to constitute a separate product market within the larger market.[25]

C. Effect of the Merger Guidelines on Circuit Court Decisions

The Merger Guidelines' market definition procedures bind the FTC and DOJ and have proved highly influential on circuit court judges, because the Supreme Court has not decided a merger case since the 1970s.[26] Circuit and district court judges have embraced the Merger Guidelines' method of defining a relevant market. Most recently, in *United States v. Oracle Corp.*, Chief Judge Walker, of the Northern District of California, looked past consumer testimony expressing a preference for the higher functioning of products in the narrow market propounded by the DOJ and asked instead "what [the consumer would] do in the event of an anticompetitive price increase by a post-merger Oracle,"[27] much like the Merger Guidelines suggest. However, while circuit and district courts are embracing the Guidelines, they have been cautious by citing both the Merger Guidelines and case law to support decisions because it is not clear if the United States Supreme Court will validate the Merger Guidelines completely. For example, Chief Judge Walker in *Oracle* found that the DOJ failed to prove that the "post-merger Oracle would have sufficient market shares in the product and geographic markets, properly defined, to apply the burden shifting presumptions of Philadelphia National Bank;" *and* that the DOJ failed to show that the HHI was increased enough to trigger a presumption of illegality under the Merger Guidelines.[28] Until the Supreme Court endorses the Merger Guidelines we can expect courts to look to both case law and the Merger Guidelines to support decisions and follow the procedures laid out in the Guidelines for defining the relevant market.

II. History of Casino Mergers

A. Kerkorian's Role in Casino History

Although the back-to-back announcements seem surprising, the

25. *Id.*

26. Gavil, *supra* note 11, at 455.

27. United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004). The court went on to find that "that these witnesses did not establish that it was more likely than not that customers of a post-merger Oracle would have no choice but to submit to a small but significant nontransitory price increase by the merged entity." *Id.* at 1132. Thus, Chief Judge Walker rejected the government's narrowly defined product market, in favor of a market that would include these substitutes. While this is only a district court opinion, it will likely prove very influential in subsequent merger cases because it was a highly visible case in a rapidly evolving industry and the opinion was well written and provides detailed guidance on how to conduct a merger analysis.

28. *Id.* at 1108.

history of the casino industry is wrought with consolidations that have set the stage for the current Monopoly game-like buying and selling of hotel properties on the Strip. Kirk Kerkorian, currently a majority owner of MGM Mirage shares, has been a major player in the history of Vegas deals. He acquired the Flamingo in 1967, and built what is today the Las Vegas Hilton in 1969, then sold both properties to Hilton Hotels in 1970.[29]

Kerkorian built four hotels that were the largest in the world in their time, and in 1969 he got approval from the SEC to offer stock to the public for his International Leisure Company at a time when the Justice Department was attempting to clean up the casino industry and Wall Street was unreceptive to gaming.[30] Kerkorian built the MGM Grand, and then sold it and a second Reno casino property to Bally Manufacturing Corporation in 1986 for $594 million.[31]

Kerkorian was also behind the buyout of Steve Wynn's Mirage only five years ago.[32] In the 2000 deal worth $6.4 billion, MGM acquired prime strip resorts like the Bellagio, the Mirage, Treasure Island, the Golden Nugget (which MGM has recently resold), and a one-half interest in Las Vegas' Monte Carlo and another casino in Mississippi.[33] This deal gave Kerkorian control of 16,600 rooms on the Las Vegas Strip and further narrowed the group of gaming competitors controlling the Strip.[34]

B. Merger Approval Under the Hart-Scott-Rodino Act

What all of Kerkorian's past deals have in common is that they all flew through FTC approvals. The Hart-Scott-Rodino Act, passed in 1977, requires that mergers worth more than $50 million be reported to the government prior to consummation.[35] After this initial report, most mergers are cleared without further review. The government makes a second request for more information in only approximately four percent of the mergers reported.[36] This means that in 2002 only forty-nine second requests were made by the FTC and DOJ, and this fell to only thirty-nine

29. Richard N. Velotta, *Kerkorian Strikes Again*, Las Vegas Sun, June 7, 2004, *available at* http://www.lasvegassun.com/sunbin/stories/gaming/2004/jun/07/516978611.html.

30. Hubble Smith & Rod Smith, *Gaming Industry: Tale of Two Companies*, Las Vegas Rev.-J., June 6, 2004, at E1, *available at* http://www.reviewjournal.com/lvrj_home/2004/Jun-06-Sun-2004/business/24044172.html.

31. *Id.*

32. Velotta, *supra* note 29.

33. *Id.*

34. Kate O'Sullivan, *Doubling Down*, CFO Mag., Sept. 1, 2004, *available at* http://www.cfo.com/printable/article.cfm/3126497?f=options.

35. Hart-Scott-Rodino Act, 15 U.S.C. § 18a (2005). The Act exempts from reporting requirements the acquisition of a hotel, but excludes from such exemption the acquisition of a hotel that includes a gambling facility. 16 C.F.R. § 802.2 (2005).

36. William J. Baer et al., *Taking Stock: Recent Trends in U.S. Merger Enforcement*, Antitrust, Spring 2004, at 15, 16.

requests in 2003.[37] Generally, the second request is made when the government is not comfortable with letting the transaction proceed as is because they have reservations about the competitive effects of the proposed merger.[38] As such, the government requests information from the merging companies, such as how they set prices, and generally works with the companies to reduce the competitive concerns.[39] The second request phase could delay the merger for months. The second request also sends off warning bells for the companies because the government carefully identifies mergers that they will likely challenge before making the second request. This is evidenced by the fact that nearly fifty percent of mergers subject to a second request are eventually challenged in an enforcement action.[40] Enforcement actions can be concluded amicably by consent decrees, where the merging companies agree to sell off assets to third parties before the deal proceeds, or nonamicably by federal court injunctions against the merger.[41]

C. HARRAH'S RECENT MERGERS

While Kerkorian has flown under the radar of the FTC, some of Harrah's seven recent mergers have not fared as well.[42] In 1998 Harrah's acquired Showboat in a $1.2 billion deal, which included an off-Strip Showboat casino that it later resold, as well as casinos in Atlantic City, New Jersey; East Chicago, Indiana; and Sydney, Australia.[43] Just one year later Harrah's acquired the off-Strip Rio casino and the Players International facility without regulatory issue.[44] However, in 2001 Harrah's announced a $650 million deal with Harvey's Casino Resorts involving four properties in Nevada, Iowa and Colorado that raised eyebrows at the FTC.[45] The FTC stalled the deal when it required more information about the Tahoe, Nevada properties. Ultimately the FTC let the deal go through despite the fact that as a result Harrah's would control forty-two percent of the available rooms in Lake Tahoe gaming facilities.[46] In 2002 Harrah's acquired Louisiana Downs without obstacles.

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37. *Id.*

38. Rod Smith, *Federal Trade Commission Query: MGM-Mandalay Merger Hits Snag*, LAS VEGAS REV.-J., July 28, 2004, at D1, *available at* http://www.reviewjournal.com/lvrj_home/2004/Jul-28-Wed-2004/business/24404249.html.

39. *Id.*

40. *Id.*

41. *Id.*

42. Julie Whitehead, *Mega Casino Merger Pending*, DELTA BUS. J. ONLINE, Jan. 2005, http://www.deltabusinessjournal.com/2005_Archives/01-January/casinos.php.

43. Rod Smith, *Mergers and Acquisitions: Boat Sale to Harrah's Official*, LAS VEGAS REV.-J., Sept. 12, 2003, at D1, *available at* http://www.reviewjournal.com/lvrj_home/2003/Sep-12-Fri-2003/business/22139833.html.

44. *Id.*

45. *Id.*

46. Jaret Seiberg, *States Zero in on Harrah's-Caesars*, MICHAEL POLLOCK'S GAMING OBSERVER, July 28, 2004, http://www.gamingobserver.com/news_july282004.html.

But in 2003 the FTC had reservations about the anticompetitive effects of Harrah's $1.4 billion merger with Horseshoe Gaming Holding Corp. and once again made a second request.[47] Analysts assumed that the FTC was questioning market control in Illinois and Louisiana, but after Harrah's sold off one property in Louisiana, the FTC allowed the third largest casino merger in history to proceed after only a seven-month delay.[48]

D. The Current Deals

Although the FTC has yet to challenge any casino industry merger in court, never before have deals this big been announced in such close proximity to one another.[49] In June 2004, MGM-Mirage announced plans to acquire Mandalay in a $7.9 billion merger.[50] MGM-Mirage was already operating twelve casinos in Nevada, Michigan and Mississippi, while Mandalay was in control of five Las Vegas Strip properties.[51] After the merger was completed the combined company controlled thirty-seven thousand hotel rooms on the Las Vegas Strip.[52] Less than one month later, Harrah's and Caesars announced that they had come to a $9.4 billion agreement under which Harrah's would take over Caesars Entertainment's twenty-eight properties in five countries.[53] Harrah's currently operates twenty-six properties in thirteen states, and if the merger gains approval, Harrah's will control the largest casino empire in the world, with over fifty holdings and $8.8 billion in annual revenue.[54]

E. Joint Consideration of the Deals

In the past, the FTC has considered the *combined* effects of pairs of megadeals announced in close proximity to one another. In the 1980s, the FTC considered a pair of proposed mergers in the soft-drink industry

47. Smith, *FTC*, *supra* note 3.

48. *Id.* As a result of this merger, Harrah's controlled two of four casinos in the Chicago area and five casinos in the Louisiana and Mississippi region. *Id.*

49. In addition to the aforementioned deals, the FTC permitted the following mergers to go through without second requests: Boyd Gaming and Coast Casinos (a combination of seventeen properties throughout the United States for $1.3 billion); a 1999 deal where Park Place Entertainment acquired Caesars World and Grand Casinos for an unprecedented $3 billion; and the Station Casinos' purchase of two off-Strip properties in 2001. *See generally Starwood Sells Caesars World, Inc to Park Place Entertainment for $3.0 Billion*, Hotel Online, Apr. 27, 1999, http://www.hotel-online.com/News/PressReleases1999_2nd/Apr99_ParkPlaceCaesars.html; *Boyd Gaming and Coast Casinos to Merger in $1.3 Billion Transaction*, Casino News, Feb. 9, 2004, http://www.americancasinoguide.com/News/2-9-04-boyd-coast.shtml. The current deals would put eighty percent of the rooms on the Vegas Strip in the control of the two newly merged companies. O'Sullivan, *supra* note 34.

50. Smith, *The MGM*, *supra* note 2.

51. Dave Schwartz, *Merger Update*, Casino [ptz], June 15, 2004, http://www.unlv.edu/centers/gaming/2004/07/merger-update-heres-great-capsule.html.

52. Smith, *The MGM*, *supra* note 2.

53. *Id.*

54. Schwartz, *supra* note 51.

jointly.[55] On the heels of Coca-Cola proposing to buy Dr. Pepper, Pepsi announced its intent to acquire 7-Up. Insiders speculated that the second deal was made in response to the first in order to maintain market share and in the hopes that if one deal was killed, they would both be. This ploy was successful when the FTC halted both deals.[56] Also in the 1980s, two pharmaceutical giants announced that they would be purchasing two of their closest competitors in separate mergers.[57] The two companies decided to have their two separate FTC cases tried in the same court proceeding, likely because neither wanted the other acquisition to proceed if their own could not.[58] The court enjoined both mergers.[59]

The FTC has precedent to consider the deals jointly, but it did not probably because very different regional markets were involved and the antitrust concerns for the two deals were distinct. There is no doubt that the FTC would still have given both deals close scrutiny had they been announced individually, given the size of the deals and the recent consolidation within the industry. However, having two megadeals announced so closely together considerably raised the level of scrutiny as more interests were at stake and the number of competitors was twice reduced.[60]

F. The Ultimate Approval of the MGM Mirage-Mandalay and the Harrah's-Caesars Deals

If Harrah's had intended to disrupt the MGM Mirage-Mandalay merger by forcing joint consideration, it was unsuccessful because on February 16, 2005 the FTC approved the MGM Mirage-Mandalay merger without imposing any conditions on the deal.[61] This deal puts nearly half of the rooms on the Strip under the control of the joined company and gives them forty-four percent of the table games and forty percent of the slots.[62]

While the MGM Mirage-Mandalay deal cleared the FTC hurdle, questions still remained about the Harrah's-Caesars deal because it was a more complex deal with overlapping properties in more geographic markets.[63] To alleviate antitrust concerns, the two gaming giants went on

55. Liz Benston, *Casino Merger Approved by Boards*, Las Vegas Sun, July 14, 2004, *available at* http://www.lasvegassun.com/sunbin/stories/gaming/2004/jul/14/517174140.html.

56. *Id.* The FTC permitted the later merger of previous targets, 7-Up and Dr. Pepper. *Id.*

57. *See generally* FTC v. Cardinal Health Inc., 12 F. Supp. 2d 34 (D.C. 1998).

58. Benston, *supra* note 55.

59. *Cardinal Health*, 12 F. Supp. 2d at 67.

60. Liz Benston, *Harrah's, Caesars Ink Deal*, Las Vegas Sun, June 15, 2004, *available at* http://www.lasvegassun.com/sunbin/stories/gaming/2004/jul/15/517178126.html.

61. *See Abstracts*, Wall St. J., Feb. 17, 2005, at A10. MGM is already in the process of selling off a Detroit casino in order to comply with Michigan law that allows only one gaming license to be held in the Detroit area.

62. Benston, *supra* note 55.

63. *Id.*

a rampage of casino sales. Harrah's avoided a potential obstacle in New Jersey by selling off the Atlantic Hilton, leaving them with four casinos. With Donald Trump's ownership of four casinos in Atlantic City as precedent, this will likely clear the state regulatory hurdle in that geographic area.[64] Harrah's also announced in September 2005 that it would be selling properties in Michigan, where state regulations allow only one gaming license in Detroit, and also that both Harrah's and Caesars would each sell one property in Mississippi.[65] Caesars aimed to appease the Nevada Gaming Commission with its sales of the Reno Hilton and Caesars Tahoe. After sorting through what would be left of the merged companies after these sales were completed, the FTC approved the deal on June 8, 2005 followed by approval from the Nevada gaming commission only two days later.

Whatever effect these historic mergers have on the face of gaming, antitrust specialists will speculate what the FTC considered in deciding as it did. While the FTC did not release a statement, the following precedents were likely considered before these decisions were reached in the MGM Mirage-Mandalay and Harrah's-Caesars deals.

III. Cases Turning on Market Definition

A. Cluster Markets

Defining the market for goods under the Merger Guidelines seems to be easy—we start with a physical product and see what the potential substitutes are; but in terms of services this becomes more complex—should all the services of the firm be linked together and what are they actually providing? In its premier merger case, *Philadelphia National Bank*, the Supreme Court recognized that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial bank'... composes a distinct line of commerce."[66] Because these groups of products and services do not face competition from other financial institutions, the Court reasoned, they are a unique market.[67] The Court again recognized a cluster of services and products three years later in *United States v. Grinnell Corp.*, stating that services should be grouped together if "companies recognize that to compete effectively, they must offer all or nearly all types of services."[68] This idea that groups of products and services should be "lumped" together can be seen in many cases and could be useful in lumping together the many products and

64. *See* Schwartz, *supra* note 51; Whitehead, *supra* note 42.
65. Whitehead, *supra* note 42.
66. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963).
67. *Id.* at 356–57.
68. United States v. Grinnell Corp., 384 U.S. 563, 572 (1966).

services of large casinos.[69]

B. Sophisticated Relevant Geographic Market Definitions

Aspen Skiing Co. v. Aspen Highlands Skiing Corp. has been criticized as an unsophisticated definition of the relevant market. "The jury found that the relevant product market was '[d]ownhill skiing at destination ski resorts,' and that the 'Aspen area' was a relevant geographic submarket."[70] This definition fails to consider rather obvious factors such as competing leisure activities or nearby ski resorts. It fails to consider submarkets of advanced, thrill-seeking skiers who would look beyond the "Aspen area" for a "destination ski resort." Subsequent cases have sought more mature definitions of the relevant market and would not accept such a haphazard definition. For example, in *FTC v. Freeman Hospital*, the District Court rejected the FTC's definition of a geographic market because it relied on where residents *actually* went, rather than where they could *practically* go for hospital services.[71] In defining the geographic market for the gaming mergers, the FTC had to consider where consumers can practically turn for alternatives and where the gaming giants were facing legitimate competition.

1. *Submarkets*

FTC v. Staples[72] and *FTC v. Cardinal Health*[73] are two recent cases that have sought to define a product market by grouping together products to create a unique submarket.

a. *Staples*

In *Staples*, the FTC halted Staples' acquisition of Office Depot, another leading office supply superstore chain.[74] The District Court rejected Staples' proposed product market of "overall sale of office products," agreeing with the FTC that the relevant product market was "consumable office supplies [sold] through office superstores."[75] In defining this submarket within the broader product market involving the sale of consumable office products through all distribution methods (i.e. mass merchandisers such as Wal-Mart, or warehouse club stores), the District Court employed the *Brown Shoe* practical indicia.[76] The *Staples*

69. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.C. Cir. 1997); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.C. Cir. 1998).

70. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.20 (1985). Although not a merger case, the relevant market had to be defined for a monopolization case under section 2 of the Sherman Act in order to find monopoly power.

71. FTC v. Freeman Hosp., 69 F.3d 260, 265 (8th Cir. 1995).

72. *Staples*, 970 F. Supp. at 1066.

73. *Cardinal Health*, 12 F. Supp. 2d at 34.

74. *Staples*, 970 F. Supp. at 1070.

75. *Id.* at 1073–74.

76. *Id.* at 1075. Defining a relevant product market is usually necessary, but not if there is direct evidence of anticompetitive effects; in this case the FTC had direct evidence of effects through pricing

court found that "evidence shows that office superstores are, in fact, very different in appearance, physical size, format... and the type of customers targeted and served [differ from] other sellers of office supplies."[77] The court also examined whether there was public or private recognition of the submarket, or whether there was evidence "that Staples and Office Depot each consider the other superstores as [their] primary competition" in deciding that the office supply superstore was a "well-defined submarket" within a broader market, that should constitute its own product market for antitrust purposes.[78] The services (such as printing, email marketing, trademark services, and prospect lists) necessary to attract the desired customers were grouped together with consumable office supply products to form a unique submarket within the broader product market.

b. Cardinal Health

The government simultaneously challenged two different mergers of prescription drug wholesalers that had been proposed in close succession in the pharmaceutical industry in *Cardinal Health*.[79] The defendants were Fortune 500 companies whose principal business was the nationwide distribution of prescription drugs to the local dispensers (such as chain pharmacies, hospitals and nursing homes). The FTC presented evidence that, in addition to delivery of pharmaceuticals, the defendant wholesalers provided value-added services, such as sophisticated ordering options, advanced inventory management systems, marketing and advertising programs, and software to assist with manufacturer bidding.[80] The court found that many of the wholesalers' customers (i.e., the local dispensers) would not be able to replicate these value-added services that they had come to rely on, or obtain them from any other source or supplier if the merged firms were to increase prices; therefore other forms of distribution, principally direct delivery from the manufacturer to local dispenser or customer, were not "reasonably interchangeable" and thus should not be included in the wholesale submarket.[81] Again, the court used the practical indicia laid out in *Brown Shoe* to reinforce this submarket by finding that internal documents show that the wholesalers did not view other forms of distribution to be viable substitutes.[82] The District Court recognized a $54 billion submarket of wholesale drug distributors within the broader $94 billion market

evidence, but nevertheless defined the relevant market because the courts have grown accustomed to this procedure.

77. *Id.* at 1078.

78. *Id.*

79. FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 43–44 (D.C. Cir. 1998).

80. *Id.* at 41. Manufacturer bidding is the process through which manufacturers compete to provide dispensers with certain prescriptions.

81. *Id.* at 49.

82. *Id.*

encompassing the delivery of prescription drugs by all forms of distribution.[83]

The idea of submarkets is helpful in an analysis of the casino industry because the services provided by casinos are distinct from other vacation resorts and other leisure activities.

2. *Hospital Mergers*

Parallels can be drawn between mergers in the health care industry and the gaming industry—although the "near presumptive illegality"[84] of hospital mergers is not likely to be reflected in the casino context. The government has been particularly successful at challenging hospital mergers in court and in obtaining consent decrees from countless hospitals that announced plans to merge. Experts speculate that the courts are concerned with the availability of reasonably priced health care post-merger, and critics claim that hospital mergers in small communities will always run afoul of the concentration benchmarks of the Merger Guidelines.[85]

Like the casino industry, there has been a rash of consolidation in the health care industry. As such, hospitals have begun competing with physician groups, stand-alone clinics and other competitors who provide health care services on an outpatient basis, because before recent technological advances some services were only available at hospitals on an inpatient basis.[86] Hospitals and casinos alike merge to increase market share, use resources more efficiently, enhance purchasing power, and acquire capital for increased borrowing leverage. However, unlike the casino industry, which has a limited number of gambling destinations, hospitals are dispersed throughout the country near population centers, due to the emergency nature of some care and consumers' preference for being hospitalized near families and homes, among other factors.[87]

Typically, courts have grouped the services of hospitals into a product market consisting of "acute care inpatient hospital services."[88] The FTC has defined this as "a common host of distinct services and capabilities that are necessary to meet the medical, surgical, and other needs of inpatients, e.g., operating rooms, anesthesia, intensive care capabilities, 24-hour nursing care, lodging and pharmaceuticals."[89] The simple definition of hospital services as those services for which there is

83. *Id.*

84. *See* United States v. Mercy Health Servs., 902 F. Supp. 968, 976 (N.D. Iowa 1995).

85. Thomas L. Greaney, *Night Landings on an Aircraft Carrier: Hospital Mergers and Antitrust Law*, 23 AM. J.L. & MED. 191, 192 (1997).

86. *See* Dayna B. Matthew, *Doing What Comes Naturally: Antitrust Law and Hospital Mergers*, 31 HOUS. L. REV. 813, 838 (1994).

87. *See* United States v. Rockford Mem'l Corp., 717 F. Supp. 1251, 1261–78 (N.D. Ill. 1989).

88. *See* FTC v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir. 1995); *Mercy Health*, 902 F. Supp. at 976.

89. FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1290 (W.D. Mich. 1996).

no outpatient substitute may misrepresent the relevant product market. Consumers may not demand all of these services as a package and the services are not always complementary to one another.[90] Hospitals may offer less than the full cluster, or may offer services not properly contained in the cluster. There is also the problem of defining the relevant geographic market because people may be more willing to travel further for more advanced care.[91]

Courts appear to be moving away from this simple cluster of hospital services. For example, in *FTC v. Butterworth Health Corp.*, the court accepted the FTC's product definition of two separate product market clusters: a general acute care inpatient hospital services cluster market and a primary care inpatient hospital services cluster market.[92] This division of the larger services cluster market makes it easier to define the geographic market and better reflects market reality because it recognizes the fact that people will travel farther for more advanced care. Thus, the court in *Butterworth Health* was able to draw two geographic markets: a larger geographic market for the more sophisticated services and a smaller geographic market for the more basic services.[93] A similar division of cluster markets may apply in the casino context because certain consumers may travel further distances for the higher stakes uniquely provided by Vegas cardrooms.

A properly defined product market centers on goods or services that the merged company would be able to exercise market power over, thereby increasing the price or decreasing the supply of these particular goods or services.[94] The FTC will use these same goods or services to calculate the market shares of the participating companies after the relevant market has been properly defined. In previous hospital merger cases, the FTC has used licensed beds, discharges and inpatient revenue to calculate market share once the market has been properly identified.[95] Market shares within the casino industry are frequently measured by comparing hotel-room capacity and casino revenue. Given that a post-merger company could fix hotel-room rates and gambling odds, the FTC likely focused on these factors as handy measurements for market share and considered these measurements when defining the relevant market.

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90. *Cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 327 (1963) (where banking services are complements and often purchased as a package).

91. *Freeman Hosp.*, 938 F.2d at 271.

92. *Butterworth Health*, 946 F. Supp. at 1290–91. This second product market includes less complex services such as "childbirth, gynecology, pediatrics, general medicine and general surgical services." *Id.* at 1291.

93. *Id.* at 1291–94.

94. *See* Martin Sikóra, *Casino Megadeals Face Arduous Antitrust Screens*, MERGERS & ACQUISITIONS: THE DEALMAKER'S J., Sept. 2004, at 4.

95. *Butterworth Health*, 946 F. Supp. at 1294.

IV. DEFINING THE RELEVANT MARKET FOR CASINO MERGERS

A. DEFINING A RELEVANT PRODUCT MARKET

The casino industry has evolved from small card rooms into a broad based vacation business patronized by consumers of all ages, incomes and interests. Today's casino is a destination resort, offering amenities such as shopping districts, multiple restaurants, spas, and world-class entertainers in addition to the slots and card tables upon which the industry was raised. Each casino offers many services and products resulting in a myriad of ways in which to slice the casino business into a relevant product market.

1. Submarket Within the Market for Vacations

If casinos are simply part of a larger relevant market for vacations, then these proposed transactions would lack any potential antitrust significance. Visiting a casino is only one of many options available to consumers taking a vacation (e.g., sightseeing, amusement parks, cruise ship, etc.). However, the Supreme Court in *Brown Shoe* recognized that "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[96] Using the practical indicia set out in *Brown Shoe*, it is much more likely that the casino industry is a separate relevant product market within the larger market for vacationers. Casino operators keep their primary focus on other casino operators, for example fearing the rise of Indian gaming as a serious competitive threat.[97] The public recognizes the casino industry as separate; casinos have distinct characteristics from other vacation destinations (i.e., themed casino as compared to a regular hotel offering); and casinos seek to attract a different type of consumer than many other vacation alternatives.[98] Likewise, if the foiling test of the Merger Guidelines were applied, casino consumers are not likely to switch to other forms of vacations in the event of a five to ten percent nontransitory increase in price. Because these alternative forms of vacations do not present suitable alternatives to a casino destination, they should not be included in the relevant market. Thus, it seems clear that casinos are a separate relevant product market in the larger market for vacations. This definition begs the question of whether the products (services and goods) offered by casinos may be broken down into smaller relevant product markets (e.g., hotel rooms, slot machines, food and beverage) or should be clustered together as a distinct cluster of services.

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96. United States v. Brown Shoe Co., 370 U.S. 294, 325 (1962).

97. *See generally*, Jennifer Nelson, *Indian Casino Problem Moves to Urban Centers*, S.F. GATE, Aug. 20, 2004, *available at* http://sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2004/08/30/jnelson.DTL.

98. *See generally Gaming Entertainment Industry Today*, INNOVATION GROUP, http://www.theinnovationgroup.net/maint/docs/innovationgroup.pdf (Mar. 2005).

2. Casinos: Clusters of Services?

Can the cluster of services provided by the MGM Mirage, Mandalay, Caesars and Harrah's be measured as a distinct product market? Products can be viewed as a cluster when firms selling only part of the cluster will not compete as effectively because consumers prefer to purchase the group of products from a single firm.[99] In the casino context, the individual services appeal to the consumer, rather than the complete cluster. For example, a tourist might play slots at Harrah's, have a room at the MGM Mirage, catch a Celine Dion show at Caesars, and sip late night cocktails at the swanky Mandalay Bay.[100] Although many of the gaming giants offer a *similar* array of products, they should not be considered as a single cluster market because the consumer does not view them as such. Consumers, at least to some degree, compare prices on the individual products, and thus competition is actually among the individual providers of services, rather than the effectively tied group of products.

The division of the cluster of services in the *Butterworth* hospital case is also useful in the casino industry because it will allow regulators to identify multiple product market clusters.[101] This will better represent the market reality that different consumers will be willing to travel different distances to secure the distinctive services that casinos offer.

3. Relevant Product Markets

In defining the relevant product market, FTC attorneys likely considered a range of alternatives when breaking down the groups of typical casino offerings, including: entertainment, rooms, food and drink, slots and tables. This reflects the resort-like nature of the casino properties and the fact that gaming is one of many sources of revenue. For example, gambling would account for only half of MGM's anticipated post-merger revenues.[102] FTC regulators would have a nearly insurmountable task of proving that casinos could exert market power over the price of entertainment (such as concerts and boxing) or food and drink given the alternatives available in any geographic market. Because casino operators would be far more capable of exercising market power over room rates and gambling odds, the relevant product market clusters should be (1) Hotel Rooms in a Gaming Facility and (2) Licensed Gaming Areas.

B. Defining Relevant Geographic Markets

These mergers were ultimately contingent upon how broadly the

99. *See* United States v. Grinnell Corp., 384 U.S. 563, 572 (1966).
100. *See* Whitehead, *supra* note 42.
101. *See* FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1285 (W.D. Mich. 1996).
102. Jerry Hirsh, *Heavyweight Showdown*, L.A. Times, July 16, 2004, at C1.

geographic market was defined. The FTC has a preference for defining the relevant markets narrowly so that they can find higher market share and thus a stronger inference of market power and potential for anticompetitive effects.[103] To do this, the FTC could have advocated multiple relevant geographic markets consisting of the cities in which the merging companies would have properties: Las Vegas, Reno, Lake Tahoe, Atlantic City, Detroit, New Orleans, etc.[104] However, if the FTC were to challenge the merger in court, I think the court would likely reject the geographic market definition. Defining the market as an individual city would not recognize the fact that individual casino properties compete with casinos in other cities within the same state, as well as within the same region.

The merging parties could have advocated a worldwide relevant geographic market, recognizing the fact that even Strip operators compete with worldwide gaming jurisdictions and travel destinations for high-income and sophisticated consumers.[105] In fact, the MGM Mirage anticipates opening properties in both China and the United Kingdom as gambling laws are being liberalized all over the world.[106]

The relevant geographic market for Hotel Rooms in Gaming Facilities and Licensed Gaming Areas should fall somewhere in between these two extreme definitions. The Supreme Court looks at the "market area in which the seller operates, and to which the purchaser can practicably turn for supplies."[107] So while many gaming giants may be worldwide operators, the vast majority of consumers cannot turn to international casinos as substitutes. Defining the relevant market as the city in which a certain property is located is too narrow, and does not recognize the fact that casinos in both New Jersey and Nevada face pressures from casinos in neighboring states.[108]

For example, in New Jersey, where one-third of the market comes from nearby Philadelphia, sixty-one thousand Pennsylvania slots threaten Atlantic City's total revenue, seventy-five percent of which comes from slots.[109] Many of these slots will be placed in racetracks that do not offer lodging and thus do not compete with Atlantic City's Hotel Rooms in Gaming Facilities Cluster. However, the relevant geographic market for the Licensed Gaming Areas Cluster may be much larger because of these racetracks. Indian tribes operating casinos with resort-like hotels in Connecticut are rapidly expanding, which indicates that the

103. GAVIL, *supra* note 11, at 463.
104. *See* O'Sullivan, *supra* note 34.
105. *MGM Mirage-Mandalay Merger Update*, BUS. WIRE, Jan. 26, 2005.
106. *Nevada Approves deal between MGM Mirage, Mandalay*, PROVIDENCE J., Feb. 27, 2005, at M3.
107. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).
108. Sikora, *supra* note 94.
109. *Id.*

FTC should draw a much broader relevant geographic market in the Northeast for the Hotel Rooms in Gaming Facilities Cluster. If the market were confined to Atlantic City, and a merged Harrah's-Caesars were to impose a five percent price increase or change the odds, Northeasterners would have a host of other options for gaming opportunities. Further, because Connecticut Indian casinos are reasonably interchangeable with Atlantic City casinos, they should be included in the relevant geographic market.

Likewise, casinos in Nevada face serious competition from California's Indian tribe casinos, which have won the exclusive right to operate Las Vegas-style casinos in the neighboring state.[110] Consumers who venture to Vegas, Reno, and Lake Tahoe by car and bus can easily turn to California's Indian casinos for an alternative in the Hotel Rooms in Gaming Facilities Cluster and the Licensed Gaming Areas Cluster if all merged Las Vegas casino companies were to raise rates on rooms or change gambling odds.[111] The MGM Mirage, Harrah's and Caesars have recognized the threat of Indian casinos to the Nevada market and have negotiated management contracts with several of the Indian tribes. As Wally Barr, former CEO of Caesars, stated, "If I'm going to lose revenue to California, I might as well go and get my share and bring it to Nevada."[112]

The relevant geographic market may be drawn more narrowly in those regional markets in which there is no competition from casinos in adjoining areas. However, state laws and property spin-offs in these markets have made any potential FTC challenges futile. State laws in Michigan and Indiana that cap the number of gaming licenses an individual casino operator can hold have alleviated antitrust concerns by ensuring that concentration levels will not rise to a level sufficient to worry the FTC.[113] In Tunica, Mississippi, where Harrah's-Caesars would have controlled roughly forty-five percent of the Hotel Rooms in Gaming Facilities Cluster, the companies have each agreed to sell off a casino property to reduce potential antitrust concerns.[114]

C. Subgroup of Consumers with Unique Demands

There is an argument that the FTC should recognize a subgroup of consumers with unique demands that make them more vulnerable to exercises of market power. There is a difference between low-rollers who

110. *MGM Mirage Signs Indian Casino Deal*, Las Vegas Sun, Sept. 12, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/archives/2002/sep/12/091210026.html?mgm+mirage.

111. *See* Sikora, *supra* note 94.

112. *See generally* Nelson, *supra* note 97.

113. Seiberg, *supra* note 46. Indiana law limits two licenses to one company, while Michigan law limits one license to one firm. *Id.*

114. *See id.*; Adam Goldman, *Harrah's, Caesars Begin Process*, Ventura County Star, Aug. 31, 2004, at 11.

make lots of small bets, mostly at slots, and high-rollers who are willing to drop over $1 million at the table of their favorite casino properties. Recognizing this unique group of consumers makes it possible to draw a different geographic market because high-rollers will travel longer distances to play at the tables of the Mecca of high-stakes gambling—Las Vegas. In fact, the number of people arriving by air to Las Vegas has been on the rise, and certainly many of these visitors are high-rollers.[115]

These high-rollers would not substitute nearby California Indian casinos in the event of a price rise because the experience at a Vegas high-stakes room is unique, as are the "comps."[116] Although many low-rolling slot machine players would be satisfied by visiting an Indian casino on a daytrip, high-stakes gamblers will be satisfied with nothing less than the posh hotel rooms of the casinos concentrated within a few square miles on the Las Vegas Strip, or the licensed gaming facilities that "comp" them to make wagers at high-stakes tables. If the FTC had looked closely at this geographic market of Las Vegas for the product market of high-stakes tables, they could have found levels of significant concentration as the two newly combined companies would control over two-thirds of the Strip's seventy-two thousand rooms available to visiting gamblers.[117]

CONCLUSION

The FTC has a lot to consider in defining the relevant market for casino mergers, and not a lot of guidance in the case law. To properly define the relevant market, the FTC must recognize that other vacation alternatives should not be included in the relevant product market, and the FTC must also reject the notion of a relevant product market consisting of the total cluster of traditional casino services. Instead, the FTC should examine the smaller product market clusters of Hotel Rooms in Licensed Gaming Facilities and Licensed Gaming Areas. The FTC likely realized that casinos face competition in many regions and in various product markets because it ultimately approved the deals nearly

115. Chris Woodyard, *Kerkorian Takes Casino Crown*, USA TODAY, June 17, 2004, at 1B (stating that the number of people arriving by air to Las Vegas has increased fifteen percent in the first four months of 2004, as compared with the same period the year before). While these figures do not represent the arrival of only high-rollers, it is indicative of the fact that people are willing to travel further to visit Las Vegas, and some percentage of these people will be traveling further to play Las Vegas table games.

116. "Comps" is the abbreviation for "complimentaries." The comps that a gambler receives are based on the play at the casino's tables. For example, for small wagers the casino might throw in free drinks, but for high-rollers who make million dollar wagers, comps can include free limo service, a luxury hotel suite and even airfare.

117. O'Sullivan, *supra* note 34. While the total number of hotel rooms in gaming facilities shows high concentration in the Las Vegas area, the FTC would likely look at luxury suites as a measure of market share, because high-rollers would likely only stay in luxury suites of casinos with high-stakes tables.

a year after they were announced. However the FTC defined the relevant market in these mergers, one thing is certain, this is not the last round of merger consolidation that the casino industry will "gamble on."